In The

Supreme Court of the United States

OCTOBER TERM, 1954

No. 152

IRA W. JAYNE, CHESTER P. O'HARA, ET AL., Judges of the Circuit Court for Wayne County, Michigan, SERVICE PARKING GROUNDS, CIVIC CENTER GARAGE, INC., MADISON PARKING CO., ET AL.,
Appellants,

vs.

CITY OF DETROIT, JOHN H. WITHERSPOON, Controller; JAMES A. HOYE, Deputy Commissioner and Director of Traffic of the Police Department of the City of Detroit,
Appellees.

Appeal from the Supreme Court of the State of Michigan

PETITION FOR REHEARING

TO THE SUPREME COURT OF THE UNITED STATES AND THE JUSTICES THEREOF:

Appellants, Service Parking Grounds, Civic Center Garage, Inc., Madison Parking Co., Parking Realty Company, Parking Investment Corporation, Park Place Corporation, Theatre Parking, Inc., Union Parking Company, Incorporated, Willis Parking Co., Jefferson Parking, Briggs Parking, and Lottie Feldman present this, their petition for a rehearing of the above entitled cause, and, in support thereof, respectfully show:

1. On October 14, 1954 an order was entered in the above cause granting appellees' motion to dismiss appellants' appeal, and dismissing said appeal "for want of a substantial federal question."

2. By their appeal appellants sought to review a final judgment of the Supreme Court of Michigan entered in an *original* proceeding therein, prohibiting appellants from maintaining their suit in the Circuit Court for Wayne County, Michigan, in Chancery, in which they challenged the validity of certain city ordinances for revenue bond financing of a number of proposed city-owned and operated off-street automobile parking garages and lots, financed by pledging the profits derived by the city from its on-street parking meters, under the ordinances which bound the city not substantially to diminish the number of existing or future on-street parking meters nor the amount of the revenue derived therefrom, while the bonds remain unpaid and to exact parking meter collections sufficient to repay the bonds.

3. In the prohibition proceedings appellants contended that the Supreme Court of Michigan had no original jurisdiction in the matter, but if it did appellants were entitled to a trial in that court of the issues of fact involved in their claims that the ordinances were unconstitutional for the reason, among others, that the city had only police-power rights in the city streets and could neither use the streets for profit purposes nor bind itself for periods exceeding 30 years, to continue such profit-making use of the streets and to maintain on-street parking meters—all for the purpose of financing off-street parking facilities in ruinous competition with appellants' off-street parking facilities.

4. In their circuit court bill of complaint, in their responses in the Supreme Court prohibition proceedings and in their petition for rehearing therein, and in their appeal to this Court, appellants contended that, contrary to the federal constitution, they were denied the due process of law and the equal protection of the laws by the prohibition

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proceeding and judgment and also by the ordinance provisions binding the city to continue on-street parking meters and fixing the amount of profit to be derived thereby.

5. The grounds upon which this petition for rehearing is based are:

(1) One basis of the prohibition judgment necessarily was that the appellants were precluded from having a judicial determination of the federal questions which they raised, on the theory that they had no sufficient interest therein and in prior litigation between other parties and under other circumstances and conditions, the federal questions had been sufficiently litigated. This presents an important and substantial question and not merely a question of state law.

(2) Regardless of ground (1), the effect of the prohibition judgment was to uphold, and to declare constitutional and effective, under the federal constitution, a bartering away of the city's police power as to the control of the city streets perforce the ordinance provisions requiring the city to continue its present and future on-street parking meters and not materially dimminish the amount of profit derived therefrom—regardless of future conditions and circumstances. Being peculiarly and vitally affected by the results, appellants contend that an important and substantial federal question was presented by their appeal.

(3) The combination of grounds (1) and (2) resulted in the denial of due process of law and equal protection of the laws contrary to the federal constitution—and this presents a very important and substantial federal question.

(4) Appellants have not been accorded the benefit of oral argument nor of an opinion by the Justices of this Court either as to the question of substantiality of the federal constitutional questions which their appeal presented, or on the merits, even though, as shown in appellants' supplemental brief dated September 22, 1954, an increasing conflict in decisions of state supreme courts exists as to the constitutionality of the ordinance provisions of the kind here involved.

WHEREFORE, it is respectfully and sincerely urged that this petition for rehearing be granted, even if rehearing be limited to the question of the validity of the ordinance provision requiring the city to continue present and future on-street parking meters and to derive therefrom an amount of revenue sufficient to finance city owned and operated off-street parking facilities competitive with those of appellants, and that the order dismissing the appeal be reversed and the motion to dismiss be denied.

Respectfully submitted,

GEORGE E. BRAND,

GEORGE E. BRAND, Jr.,
Attorneys for Appellants.

November 3, 1954.

CERTIFICATE OF COUNSEL

I, George E. Brand, one of the counsel for the above named appellants, do hereby certify that the foregoing petition for a rehearing is presented in good faith and not for delay.

GEORGE E. BRAND,
Counsel for Appellants.

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APPELLANTS' BRIEF ON PETITION FOR REHEARING

Unguided by any opinion, the hazards of erroneous assumptions are inescapable.

Although appellants claimed that the denial of a trial, in some court, of the issues of fact presented in their chancery action denied them equal protection and due process of law, we assume that this Court viewed that question as involving only a settled question of state law.

We also assume that the questions whether off-street parking facilities bore a sufficient relationship to regulation of on-street parking to justify the use of street parking meter collections for the city's acquisition and operation of off-street parking garages and lots, and whether the street parking fee rate was proper, were likewise considered as involving nothing more than non-reviewable questions of state law.

To treat appellants' appeal as involving only such limited questions is to over-simplify, because even if it be conclusively settled that the relationship referred to did exist and the fixing of a meter rate is a legislative function, *there is still presented the important question as to the right of the city, by attempted exercise of police power, to bind itself to continue to maintain all present and all future on-street parking meters without material diminution in the number thereof or of the amount of money* thereby collected, for the purposes of financing the city's off-street facilities in ruinous competition with appellants, or for any other purpose.

There can be no doubt that the ordinances herein do deprive the city of the right, from time to time and as varying conditions may require, to exercise its police power over the use of the city streets. The ordinances recite that they are pursuant to the Michigan Revenue Bond Act of 1933 as amended (R. 90-93).[1] However, no provision of that Act or of the Michigan Constitution even purports to authorize the city to bind itself for long periods of years to maintain present and future parking meters and thereby to collect any specified amounts for the purpose of revenue bond financing of parking facilities or for any other purposes. The inclusion of such provisions in the ordinances in question was solely by city legislation. However, consti-

[1] Act No. 94, P.A. Mich. 1933, §§ 141.101-141.138, C.L. '48.

tutionality of these extra provisions does not and cannot turn upon any question of state law because the limitations imposed by the federal constitution on the exercise of police power are applicable not only to the city but to the state itself. Neither can barter away its police power.

Chicago & Alton Railroad Company v. Tranbarger, 238 US 67, 59 L ed 1204. In referring to police power of the state, this Court said:

> "It is established by repeated decisions of this court that neither of these provisions of the Federal Constitution has the effect of overriding the power of the state to establish all regulations reasonably necessary to secure the health, safety, or general welfare of the community; that this power can neither be abdicated nor bargained away, and is inalienable even by express grant; and that all contract and property rights are held subject to its fair exercise."

The Boston Beer Company v. Commonwealth of Massachusetts, 97 US 25, 24 L ed 989. In referring to the exercise of police power, for health, etc., this Court said:

> "The Legislature cannot, by any contract, devest itself of the power to provide for these objects."

Accord:

Missouri, Kansas, & Texas Railway Company v. Oklahoma, 271 US 303, 70 L ed 957.

Texas & New Orleans Railroad Company v. Miller, 221 US 408, 55 L ed 789.

E. C. Warner Co. v. W. B. Foshay Co. (CCA 8), 57 F 2d 656.

Village of Grosse Pointe Shores v. Ayres, 254 Mich. 58.

(Of course the Michigan Supreme Court could not confer upon the city any power to contract away its police power over the city streets.)

The foregoing principles have been applied to a revenue bond ordinance of the same type as is involved in the instant appeal.

Britt v. City of Wilmington (Supreme Court, North Carolina, 1952), 72 S.E. (2d) 289. Action to restrain the issuance of off-street parking facility revenue bonds and the pledging of revenues from on-street parking meters for the payment thereof. In reversing the lower court which had refused to grant the injunction, the Supreme Court said:

> "It follows that the mere fact the off-street parking facilities defendant proposes to install tend to promote the safety, convenience, or general welfare of its citizens is not determinative. * * *"
>
> "* * * Furthermore, the governing board of a municipality may not bind itself to enact, and the municipality to maintain for tweny-five years, a regulatory ordinance pertaining to the governmental functions of the city. *It cannot thus farm out is legislative functions or delegate to private individuals the right to determine whether and to what extent one of its police regulations may be amended.*" (Italics added)

To the same effect is the holding in the very recent case of *Sammons v. City of Beaufort* (Supreme Court of South Carolina, July 21, 1954), 83 S.E. 2d 153, wherein the court said:

> "We think that the covenant to maintain during the life of these bonds parking meters on the streets of Beaufort and to charge fees for the use of parking spaces thereon sufficient to service said bonds, constitutes an ineffective attempt to barter away the police power. * * * The governing body of the City of Beaufort must be left unrestricted in the future to adopt any parking regulations necessary for the public safety and welfare."

In their circuit court bill of complaint and in their defense in the prohibition proceedings and their application for rehearing therein, appellants claimed that the provisions of the ordinances binding the city to maintain

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parking meters and thereby to collect funds sufficient to pay for the off-street parking facilities was contrary to the Fourteenth Amendment (R. 127, 130-132, 219, 263-264).

As appellants alleged in their bill of complaint* (R. 206), the ordinance provisions binding the city to continue the parking meter collections for the purpose of supplying off-street parking facilities below cost would result in wrongful and unfair competition with appellants and destroy or greatly depreciate their parking business and properties. The right of appellants to challenge this committment of the city is surely substantial and redress is available only through litigation instituted and prosecuted by them.

On page 3 of appellants' original brief herein decisions of this court are cited holding that a state court judgment sustaining the validity of a state statute as a valid exercise of police power, against a claim of repugnancy to the Fourteenth Amendment, is reviewable on appeal.

Ultimate protection against excessive exercise of police power must be found in the court. The right to make the challenge and to have a judicial determination of the validity of the challenged act is a substantial one and when, as in this case, the challenge is based on repugnancy of the challenged act of the Fourteenth Amendment and the challenger is denied the right to litigate the question, a substantial federal question arises.

Even if the decision of the Michigan Supreme Court as to the validity of the ordinances under the Michigan Constitution and statutes was not reviewable, the decision of that court, which either denied appellants the right to litigate the alleged repugnancy of the ordinances to the Fourteenth Amendment or upheld constitutionality against such attack, presented a substantial federal question, determination of which is only attainable in this Court.

*, supra, and in their response in the prohibition proceedings

Substantiality of the question as to the constitutionality of the type of ordinance provisions here involved is attested by the state supreme court decisions to which we have referred. Those referred to in appellees' original brief did not regard the question as frivolous or unimportant.

Respectfully submitted,

GEORGE E. BRAND,

GEORGE E. BRAND, Jr.,
Attorneys for Appellants.

Dated November 6, 1954.